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No. 00-1196

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,

v.

SHIRLEY K. ROGERS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER WAL-MART STORES, INC.

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QUESTION PRESENTED

When a plaintiff voluntarily dismisses an action and subsequently commences a new action containing the same claims against the same defendant, does Federal Rule of Civil Procedure 41(d) permit a district court to require the plaintiff to pay costs and attorneys' fees incurred in defending against the prior action?

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER WAL-MART STORES, INC.

The Chamber of Commerce of the United States (the Chamber), as *amicus curiae*, respectfully submits this brief in support of the petitioner Wal-Mart Stores, Inc.[1] By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.

[1] This brief was written entirely by counsel for the Chamber, and no person or entity other than the Chamber, its members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

STATEMENT OF INTEREST

The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the fifty states and the District of Columbia, the Chamber represents an underlying membership of nearly 3,000,000 businesses and organizations, with approximately 140,000 direct members of every size, in every sector of the economy, and every region of the country. The vast majority of the Chamber's members are small businesses.

An important function of the Chamber is to represent the interests of its members in important matters before the federal courts as well as before Congress and the Executive Branch, including federal agencies and commissions. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases before this Court that have raised issues of vital concern to the nation's business community. Recent representative cases in which the Chamber has filed *amicus curiae* briefs include: *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 297 (2000) (granting petition for writ of certiorari); *Circuit City Stores, Inc. v. Adams*, 120 S. Ct. 2004 (2000) (same); *United States v. Mead Corp.*, 120 S. Ct. 2193 (2000) (same); *Kolstad v. ADA*, 527 U.S. 526 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Auer v. Robbins*, 519 U.S. 452 (1997); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995).

Because American businesses and their customers shoulder the weight of high litigation costs in this country, the Chamber is keenly interested in the outcome of this litigation. Protracted litigation imposes significant costs on the Chamber's members, and the issue presented directly relates to the magnitude of these costs.

SUMMARY OF ARGUMENT

Wal-Mart's Petition for Writ of Certiorari presents a discrete question concerning the arsenal by which federal courts may discourage unduly protracted litigation. The amounts at issue are modest, but the significance of this case to the American business community is not. Unnecessary litigation costs impose a staggering burden on American businesses. When a plaintiff recommences an action, the ability to recover amounts expended to defend against an identical prior lawsuit voluntarily dismissed by the plaintiff serves to lessen this burden, and guards against the strategic abuse of the legal system.

The Court of Appeals for the Sixth Circuit noted correctly that the lower federal courts are divided regarding this issue. *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir. 2000). The court failed to recognize, however, that Rule 41(d) is a descendent of a court's inherent authority to levy sanctions before allowing a plaintiff to commence a previously-dismissed lawsuit. Like the power to dismiss a lawsuit for failure to prosecute, this power "is of ancient origin, having its roots in judgments of *nonsuit* and *non prosequitur* entered at common law." *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962).

In fact, Rule 41 was specifically designed to counter the prejudice to defendants caused by the liberal availability of nonsuits under the common law. Nevertheless, repetitive litigation continues to impose significant costs on American businesses. Indeed, the ability to obtain a voluntary dismissal after a defendant has incurred significant litigation expenses and recommence the action without threat of paying those expenses remains an effective means of extracting a favorable settlement from a defendant even in a frivolous lawsuit.

The clear division among lower courts on this issue warrants plenary review by the Court. This case presents an ideal opportunity, not likely to arise again soon, for the Court to

provide needed guidance. *Amicus* urges the Court to grant Petitioner Wal-Mart Stores, Inc.'s Petition for Writ of Certiorari.

ARGUMENT

I. THE COURT SHOULD AFFIRM THE POWER OF FEDERAL COURTS TO DISCOURAGE FRIVOLOUS LITIGATION

The question presented by Wal-Mart's Petition for Certiorari is about the power held by federal courts to dissuade unduly repetitive or vexatious litigation. Federal Rule of Civil Procedure 41(d) is an expression of this power, and includes the authority to require payment of costs and attorneys' fees as a condition for commencing a subsequent lawsuit.

The authority to require a plaintiff to pay costs incurred in a prior voluntarily dismissed action before allowing the plaintiff to commence a second action "was designed to prevent oppressive and vexatious litigation and also to enable a party who has recovered costs to obtain payment before being subjected to further litigation relating to the same subject-matter." *Weidenfeld v. Pacific Improvement Co.*, 101 F.2d 699, 700 (2d Cir. 1939) (Augustus Hand, J.); *accord Esposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000) ("the purpose of Rule 41(d) . . . is to deter forum shopping and vexatious litigation"); Moore's Fed. Prac. § 41.70[1] ("The purpose of the rule is to prevent forum shopping and vexatious litigation.").

Before the enactment of the Federal Rules of Civil Procedure, courts exercised their inherent authority under the common law to stay proceedings until a plaintiff paid the costs of a prior action involving substantially the same claim for relief as contained in the pending action. *See, e.g., Henderson v. Griffin*, 30 U.S. 151, 158 (1831); *Golden v. New York, N.H. & H.R. Co.*, 222 F. 348, 349 (S.D.N.Y. 1915)

(Learned Hand, J.); *Williams v. Getz*, 17 App. D.C. 388, 389-90 (1901); *Kimble v. Western Union Tel. Co.*, 70 F. 888, 889-90 (D. Del. 1895); *Buckles v. Chicago, M. & St. P. Ry.*, 47 F. 424, 426 (W.D. Mo. 1891); *Cocke v. Henson*, 5 F. Cas. 1148, 1149 (D. Ark 1832) (No. 2929a); *Ex Parte Mathews*, 40 So. 78, 79 (Ala. 1906); *Hobbs v. Louisville, H. & St. L. Ry.*, 102 S.W. 818, 819 (Ct. App. Ky. 1907); *Knee v. Baltimore City Passenger Ry.*, 40 A. 890, 892 (Md. 1898); *State ex. rel. Peery v. District Court*, 166 N.W. 1080, 1081 (Minn. 1918); *Hewitt v. Steele*, 38 S.W. 82, 82-83 (Mo. 1896); *Perkins v. Hinman*, 19 Johns. 237, 237 (N.Y. 1821); *Altman v. Altman*, 12 Pa. 246, 246 (1849); *Schwede v. Hemrich*, 69 P. 643, 644 (Wash. 1902); *Felt v. Amidon*, 3 N.W. 825, 828-29 (Wis. 1879); *cf.* IV St. George Tucker, Blackstone's Commentaries 296 (1803) (noting that after discontinuing a lawsuit, a plaintiff may "begin again, by suing out a new original, usually paying costs to his antagonist.").

In *Henderson v. Griffin*, the Court recognized this authority as necessary to protect defendants from abusive practices:

> Costs had accrued to the defendant by a suit brought and prosecuted by the plaintiffs in this suit, in the name of those who had no right to the land. It was perfectly consistent with the justice of the case, that when these plaintiffs sued the same defendant in their own name, for the same land, they should reimburse him for the past costs to which they had subjected him before they should be permitted to proceed further. Rules of this kind are granted by courts to meet the justice and exigences of cases as they occur, not depending solely on the interest which those who are subjected to such rules may have in the subject matter of suits which they bring and prosecute in the names of others; but on a variety of circumstances which in the exercise of a sound discretion may furnish a proper ground for their interference. . . . It is the exercise of a summary power

> to compel what under the circumstances of the particular case the court consider to be justice to a party in defending himself against an unfounded claim.

30 U.S. at 158-59.

While not directly implicated in this case, a court's inherent authority plainly includes the power to award attorney's fees. *Chambers v. NASCO, Inc.*, 501 U. S. 32, 45 (1991) ("[A]n assessment of attorney's fees is undoubtedly within a court's inherent power."); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-66 (1980) (discussing inherent authority to assess attorneys' fees against counsel); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 (1975) (acknowledging "assertions of inherent power in the courts to allow attorneys' fees in particular situations"); *Hall v. Cole*, 412 U.S. 1, 4 (1973) ("[F]ederal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require."); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939) ("Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts.").

As a general matter, courts may award attorney's fees under their inherent power only: (1) under the "common fund exception;" (2) when a party willfully disobeys a court order; and (3) when a party has acted in bad faith or vexatiously. *Chambers*, 501 U.S. at 45-46; *see also Roadway Express*, 447 U.S. at 766. It is important to recognize in this context, however, that the common law *presumed* that a second-filed lawsuit following a voluntary dismissal was vexatious. In fact, the authority to require the payment of costs from the prior action was "based upon the *presumption* that the second action is vexatious, or, if not vexatious, that the failure to succeed in the first action was attributable to the fault of the plaintiff." *Felt*, 3 N.W. at 828 (emphasis added); *accord Scales v. Central Iron & Coal Co.*, 55 So. 821, 825 (Ala. 1911) (Mayfield, J., concurring) (noting that second action was "deemed vexatious" under English common law); *Kitts v. Willson*, 89 Ind. 95, 99

(1883) ("the second action will be deemed vexatious until this inference shall be removed by a showing on the part of the plaintiff"); *Lake Agric. Co. v. Brown*, 114 N.E. 755, 756 (Ind. 1917) ("a second action between the same parties for the same cause will be presumed to be vexatious"); *Jones v. Barnard*, 63 Mo. App. 501, 505 (1895) ("the presumption is that the second action is vexatious"); *Bridge v. Sumner*, 18 Mass. 371, 371 (1823) ("The second action in such case is deemed to be vexatious."); *Cuyler v. Vanderwerk*, 1 Johns. Cas. 247, 247 (N.Y. Sup. Ct. 1800) ("The plaintiffs having voluntarily suffered a nonsuit in the first suit, the second is to be deemed vexatious."); *Odegard v. North Wis. Lumber Co.*, 110 N.W. 809, 814 (Wis. 1907) ("[W]here a plaintiff has been nonsuited and brings a second action for the same cause, a presumption arises either that the second action is vexatious or that the cause of action is without merit.").

Drawn from a court's inherent authority, the power under the common law to require the payment of costs before commencing a subsequent lawsuit was measured only by "what under the circumstances of the particular case the court consider to be justice to a party in defending himself against an unfounded claim." *Henderson*, 30 U.S. at 159; *accord Buckles*, 47 F. at 426 ("[T]his being in the nature of an equitable discretion, inherent in every court, it should be exercised cautiously, ex aequo et bono, employing or declining the power as the right and justice of the particular case may seem to require."). Indeed, this Court has long recognized that the statutory restrictions on fee shifting "contain[] nothing which can be fairly construed to deprive the Court of Chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require . . . ." *Trustees v. Greenough*, 105 U.S. 527, 536 (1882).

It therefore is not surprising that courts enjoyed the authority to require a plaintiff to pay the litigation costs—

including attorneys' fees—incurred in defending against a previously dismissed action before commencing a new action asserting the same or similar claims. *See Reaume v. Wayne Circuit Judge*, 89 N.W. 953, 954 (Mich. 1902) (affirming trial court's grant of motion to set aside nonsuit upon payment of costs and attorney's fee).

Federal Rule of Civil Procedure 41(d) statutorily embodies the inherent power recognized under the common law in the specific context of repetitive filings. In fact, Rule 41 was enacted in response to liberal nonsuit provisions that permitted "the annoying of a defendant by being summoned into court in successive actions and then, if no settlement is arrived at, requiring him to permit the action to be dismissed and another one commenced at leisure." American Bar Ass'n, Proceedings of the Institute on Federal Rules 350 (1938) (remarks of Hon. George Donworth, member of Supreme Court Advisory Committee); *accord Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 410 (1990) (Stevens, J., concurring in part and dissenting in part) ("Prior to the adoption of Rule 41(a)(1), ... an unscrupulous plaintiff could harass a defendant by filing repetitive baseless lawsuits as long as each was dismissed prior to an adverse ruling on the merits."); *cf. In re Skinner & Eddy Corp.*, 265 U.S. 86, 93 (1924) (noting that "[i]t is ordinarily the undisputed right of a plaintiff to dismiss a bill in equity before final hearing"); *Barrett v. Virginian Ry. Co.*, 250 U.S. 473, 476 (1919) ("At the common law, as generally understood and applied, a nonsuit could be taken freely at any time before verdict if not indeed before judgment."); Neil C. Head, *The History and Development of Nonsuit*, 27 W. Va. L. Q. 20, 22 (Nov. 1920) ("It is clear that at common law the plaintiff had an absolute right to become nonsuit at any time before the jury rendered the verdict.").

At the same time, Rule 41 was designed to maintain only a "narrow slice" of the "expansive control" afforded plaintiffs

under the common law. *Cooter & Gell*, 496 U.S. at 397. The drafters even introduced the "two dismissal rule," an innovation unknown to the common law that eliminated the plaintiff's relatively unhindered right under the common law to repeatedly file and voluntarily dismiss an action. 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2368 (1995). Under Rule 41(a)(1), the second time that a plaintiff voluntarily dismisses an action, the dismissal constitutes an adjudication on the merits. Fed. R. Civ. P. 41(a)(1). The introduction of the "two dismissal rule" is evidence that Rule 41 was "designed to curb abuses of these nonsuit rules." *Cooter & Gell*, 496 U.S. at 397.

Enacted under these circumstances, Rule 41 was in no sense aimed at limiting a court's inherent authority to counter abuses of the right of voluntary dismissal. The language of Rule 41(d) actually mirrors the inherent power authorized under the common law in that it allows federal courts to require "the payment of costs of the action previously dismissed *as it may deem proper*." Fed. R. Civ. P. 41(d). In other words, a court's authority to require a plaintiff to pay costs incurred in defending against a prior voluntarily dismissed action remains defined by "what under the circumstances of the particular case the court consider to be justice to a party in defending himself against an unfounded claim." *Henderson*, 30 U.S. at 159.

In a similar context, this Court has held that Rule 41(b) was not meant to limit a court's inherent authority to dismiss an action *sua sponte* for lack of prosecution. *Link v. Wabash R.R.*, 370 U.S. 626 (1962). In *Link*, the petitioner argued that because Rule 41(b) did not expressly authorize a dismissal *sua sponte* for lack of prosecution, the Federal Rules permitted an involuntary dismissal only upon motion by the defendant. Rejecting this argument, the Court explained:

> Neither the permissive language of the Rule—which merely authorizes a motion by the defendant—nor its policy requires us to conclude that it was the purpose of

> the Rule to abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.... It would require a much clearer expression of purpose than Rule 41(b) provides for us to assume that it was intended to abrogate so well-acknowledged a proposition.

Id. at 630-32.

By attempting to read Rule 41 without reference to its common law antecedent, the Court of Appeals for the Sixth Circuit has made the same error as the petitioner in *Link*. The Chamber respectfully requests that the Court take this opportunity to address this error, and affirm the power of federal courts to discourage vexatious litigation.

II. THE SIXTH CIRCUIT'S OPINION PROMOTES THE FILING OF FRIVOLOUS LITIGATION

The issue raised by Wal-Mart's Petition for Writ of Certiorari is significant to American businesses because the answer implicates the scale of the burden imposed by frivolous litigation. Frivolous or not, tort litigation is expensive, inefficient, and poses a significant cost on American society, and American businesses in particular. Litigation costs oppress both tortfeasor and the non-negligent alike. As a result, defendants often face substantial costs regardless of the merits of a plaintiff's lawsuit.

This flaw in our system—that litigation costs are often divorced from the merits of a case—relates directly to our procedural rules. The Federal Rule at issue, Rule 41, preserves a plaintiff's ability to harass defendants through

strategic use of voluntary dismissal. This procedural device is used to heighten litigation costs and therefore encourage a defendant to settle a frivolous lawsuit. The prospect of paying a defendant's costs and attorneys' fees before recommencing a previously dismissed lawsuit, however, acts as a disincentive against this strategy. Because the potential infliction of significant litigation expenses on a defendant is critical to the persistence of frivolous lawsuits, the issue presented by Wal-Mart's Petition has considerable import.

The excesses of the tort system are familiar both to the Court, *cf. Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 297 (2000) (granting petition for writ of certiorari addressing standard of review of trial court's ruling on constitutionality of punitive damage award); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1995) (setting aside punitive damage award as contrary to due process), and to Congress, *e.g.*, 146 Cong. Rec. H466 (daily ed. Feb. 16, 2000) (statement of Rep. Biggert). In 1994, tort costs totaled over $150 billion, over three times the total in 1981, and far in excess of any other country. Tillinghast-Towers Perrin, Tort Cost Trends: An International Perspective, App. 2 (1995).

Legal fees undoubtedly constitute a major portion of this cost. *See, e.g.*, David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. Rev. 72, 91 (1983). Because a potential defendant faces substantial legal fees regardless of the outcome of litigation, our system deters not only risky behavior but also societally beneficial conduct. For example, the prospect of litigation has stifled the development of new contraceptives, vaccines, small planes and cars, medical procedures, and pesticides. Peter Huber, Liability: The Legal Revolution and Its Consequences 155-64 (1990); *see also* Don Dewees et al., Exploring the Domain of Accident Law 198-201 (1996) (collecting studies showing reduced innovation in various industries as result of litigation); James R. Thomas, Jr., *Liability Fears Gag Engineers*, Engineering News-Record,

May 4, 1998 (noting that threat of litigation has stifled use of new technology by engineers). "When all is said and done, the modern rules do not deter risk: they deter behavior that gets people sued, which is not at all the same thing." Huber, *supra*, at 164.

Frivolous lawsuits also remain an exasperating feature of our legal system. One recent lawsuit, for example, reportedly alleges that a pickle from a McDonald's hamburger burned the plaintiff's chin. Gail Rippey, *Wheels of Civil Justice Stuck in the Mud in Pa.*, Sunday News, Lancaster Pa., Jan. 28, 2001 at D5. No incident is too small for an enterprising plaintiff's lawyer to begin imposing costs on a defendant business.

Procedural rules that expand the stages of litigation encourage the filing of such frivolous lawsuits. Specifically, a plaintiff with a claim worth less than the cost of litigation may still be able to extract a settlement by increasing the litigation costs imposed on the defendant and bargaining at various stages of the litigation before trial. Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. Legal Stud. 1, 12 (1996). "The credibility of [a negative-expected-value] suit can arise from the fact that bargaining in 'late' rounds occurs after some of the plaintiff's litigation costs are sunk. There may arrive a stage at which a threat to continue all the way to judgment becomes credible by virtue of the small fraction of the litigation costs that remains to be incurred." *Id.* at 4. Anticipating this later round of bargaining, a defendant may settle the lawsuit at the outset—even though the plaintiff's litigation costs will exceed the expected value of a judgment—rather than proceed to the stage where the plaintiff will have a credible threat of going forward. *Id.* at 24 ("If the litigation process in these cases is sufficiently divisible, this divisibility might by itself provide plaintiffs with a credible threat, and it therefore might provide the defendant with an 'economic' reason to pay.").

Moreover, procedural rules can "provide incentives as powerful as those provided by substantive rules." Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 Ind. L.J. 59, 69 (Winter 1997). This is because procedural rules play a significant role in defining the costs of litigation. By doing so, procedural rules influence the dynamics of settlement. Frivolous lawsuits therefore remain viable so long as a defendant can be motivated to settle primarily by the threat of incurring additional legal fees.

This scholarship partly explains why "[d]ue to sloth, inattention, or desire to seize tactical advantage, lawyers have long indulged in dilatory practices. . . . [and] many actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures . . . ." *Roadway Express, Inc.*, 447 U.S. at 757 n.4 (citing C. Dickens, Bleak House 2-5 (1948)). Plaintiffs with meritless claims capitalize on procedural devices that permit delay because such tactics increase the litigation costs imposed upon defendants, and thereby increase the settlement value of frivolous lawsuits.

Voluntary dismissal is one such device. Plaintiffs historically have exploited the ability to nonsuit an action as a strategic tool to extract a favorable settlement from a defendant. Federal Rule 41 was aimed at this very "mischief." American Bar Ass'n, *supra*, at 349-50 (remarks of Hon. Donworth). The potential for abuse remains available under the Federal Rules because recommencing a previously dismissed action after the defendant has incurred substantial legal fees greatly enhances the cost of the litigation. Indeed, "[t]he burden of being compelled to defend successive unconscionable suits . . . . increases in more than arithmetical proportion. . . . [S]uccessive suits may even wear a defendant down to the point of capitulation." *Soffos v. Eaton*, 152 F.2d 682, 683 (D.C. Cir. 1945).

Accordingly, the authority to require a plaintiff to pay attorneys' fees incurred in defending against a previously

dismissed action becomes important when the defendant is forced to expend significant resources in the previous lawsuit. Under appropriate circumstances, such as when a plaintiff employs a voluntary dismissal to escalate the defendant's exposure to legal fees in defending against a frivolous lawsuit, courts must be able to levy a meaningful sanction.

> Frivolous lawsuits cause appreciable harm to many persons, and in many ways. The person against whom the groundless suit is brought is subject to serious harassment and inconvenience, pecuniary loss through necessary attorney's fees, deprival of time from his business or profession, and, in some cases, harm to reputation and even physical damage to person or property. The court system itself becomes more clogged, disrupted, and delayed, thus affecting the taxpayers in general, and other litigants who have their suits delayed. The situation cries out for remedies to avert these harms.

John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 Hofstra L. Rev. 433, 433 (Spring 1996). In light of the significance of the question presented, the Chamber respectfully requests that this Court grant Wal-Mart Stores, Inc.'s Petition for Writ of Certiorari.

III. THIS CASE PRESENTS A RARE AND IDEAL OPPORTUNITY TO ADDRESS AN IMPORTANT PROCEDURAL ISSUE

Wal-Mart Stores, Inc.'s Petition raises an issue that has deeply divided the lower courts and, by its very nature, is not likely in an individual case to warrant the expenditure required to litigate before this Court. In other words, it takes a lot less to discourage a plaintiff from voluntarily dismissing and subsequently recommencing a lawsuit than it usually does to warrant an appeal and argument before this Court. Wal-Mart Stores, Inc.'s petition provides an opportunity for the Court to overcome this economic fact.

Moreover, this case provides a clean vehicle by which this Court can resolve a very well-defined yet unsettled question. As noted by Petitioner Wal-Mart Stores, Inc., whether Rule 41(d) includes attorneys' fees is a question upon which the lower courts do not agree. *Compare Sanderson v. Spectrum Labs, Inc.*, No. 00-1872, 2000 U.S. App. LEXIS 34058, at *17-19 (7th Cir. Dec. 29, 2000); *Duffy v. Ford Motor Co.*, 218 F.3d 623, 632-33 (6th Cir. 2000); *Meredith v. Stoval*, No. 99-3350, 2000 U.S. LEXIS 14553, at *4-5 (10th Cir. June 23, 2000), *Esposito*, 223 F.3d at 500; *Simeone v. First Bank Nat'l Ass'n*, 971 F.2d 103, 108 (8th Cir. 1992), *Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Cir. 1980), *Esquivel v. Arau*, 913 F. Supp. 1382 (C.D. Ca. 1996), *Anders v. FPA Corp.*, 164 F.R.D. 383 (D.N.J. 1995); *Behrle v. Olshansky*, 139 F.R.D. 370 (W.D. Ark. 1991), and *Eager v. Kain*, 158 F. Supp. 222, 223 (E.D. Tenn. 1957), *with Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868 (6th Cir. 2000), *Simeone v. First Bank Nat'l Ass'n*, 125 F.R.D. 150, 155 (D. Minn. 1989), *aff'd in part and vacated in part*, 971 F.2d 103 (8th Cir. 1992), *Pocono Racing Mgmt. Ass'n v. Banks*, 434 F. Supp. 507, 513 (M.D. Pa. 1977), and *Yetter Homes, Inc. v. Coastal Cabinet Works, Inc.*, 234 F. Supp. 568, 572 (E.D.S.C. 1964). What is more important, however, is that waiting until even more lower courts grapple with this issue is not likely to significantly alter the terms of the debate. Rule 41(d) contains the same language, and is designed to perform the same function, as when it became law in 1938.

CONCLUSION

For the foregoing reasons, and for those stated in the petition, the Court should grant the petition.

Respectfully submitted,

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